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In the Supreme Court of the United States

OCTOBER TERM, 1943

RATHJEN BROTHERS, *Petitioner*

v.

THE UNITED STATES OF AMERICA *Respondent*

Petition for Writ of Certiorari to the United States Court of Customs and Patent Appeals

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RATHJEN BROTHERS, *Petitioner*

v.

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Petition for Writ of Certiorari to the United States Court of Customs and Patent Appeals

Above-named petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Customs and Patent Appeals, reversing a judgment of the United States Customs Court.

OPINIONS BELOW

The opinion of the trial court (R 8-12) is reported as CD 659, 9 USCCR ..... The opinion in the Court of Customs and Patent Appeals (R 18) is reported as CAD 250, 31 CCPA (Customs) ....; 137 F2d 103.

JURISDICTION

The judgment of the Court of Customs and Patent Appeals was entered July 6, 1943, and on September 29, 1943, petitioner's application for extension of time until November 5, 1943, for filing this petition was granted by the Chief Justice (R 25). The jurisdiction of this court is invoked under section 195 of the Judicial Code, as amended, 28 USC 308.

QUESTIONS PRESENTED

I) There are two fundamental questions. The first is whether as held by the lower court there is an irreconcilable conflict between a trade-agreement provision for "rum, in bottles each containing one gallon or less" and what was considered to be a subsequent internal-revenue provision for "all distilled spirits"; in other words whether the latter provision repealed the former. This question arises as follows:

Pursuant to section 350 (a), Tariff Act of 1930, as amended by the act of June 12, 1934, 48 Stat. 943, the President entered into a trade agreement with the Republic of Cuba, effective September 3, 1934, 49 Stat. 3559 (TD 47232) by which rates of customs duties and internal-revenue taxes upon enumerated Cuban products entering the United States were specified. Included in this agreement was a clause (article VIII) guaranteeing that taxes assessed upon importation of the specified products would not exceed those imposed by laws of the United States in effect on September 3, 1934. One product thus referred to was "rum, in bottles containing each one gallon or

less'' (paragraph 802), as to which upon importation the internal-revenue tax then assessable under a provision for ''distilled spirits'' was $2 per proof gallon. Section 600, Revenue Act of 1918, as amended.

By section 710 of the Revenue Act of 1938, effective July 1, 1938, the rate of tax upon distilled spirits was changed to $2.25 per proof gallon, and on July 6 and 14, 1938, when petitioner imported from Cuba ''rum, in bottles each containing one gallon or less,'' the collector of customs at the port of San Francisco exacted thereon, under authority of said act of 1938, a tax of $2.25 per proof gallon. Thereafter petitioner brought this action, contending that in accordance with article VIII of the Cuban trade agreement of 1934, supra, the maximum tax was $2 per proof gallon.

Based upon those facts these questions are presented:

1) Should the courts, if possible, construe the statute and the trade agreements so as to give effect to both?

2) Can the statute and the trade agreement involved in this case be so construed?

3) Should it be assumed that in 1938, by changing the rate of internal tax upon all distilled spirits produced in or imported into the United States, Congress intended to modify the provisions of the international obligation of 1934, referred to above?

II) The second fundamental question is whether Congress in enacting section 710, Revenue Act of 1938, actually enacted a statute conflicting with the Cuban agreement. This question was not presented to the court below nor referred to by said court. However, it will be dis-

cussed at the conclusion of the petition. Except for this point the petition has been prepared as though the Revenue Act of 1938 was, as held by the court below (R 22), a statute by which a tax was levied upon all imported distilled spirits.

STATUTES AND TRADE AGREEMENTS INVOLVED

The pertinent statutes and trade agreements are:

Act of June 12, 1934, amending the Tariff Act of 1930, c. 474, 48 Stat. 943.

Revenue Act of 1918, sec. 600, c. 18, 40 Stat. 1057, 1105.

Revenue Act of 1926, sec. 900, c. 27, 44 Stat. 104.

Revenue Act of 1938, sec. 710, c. 289, 52 Stat. 447, 572.

Liquor Taxing Act of 1934, sec. 2, c. 1, 48 Stat. 313.

Cuban Trade Agreement of 1934, 49 Stat. 3559.

Supplementary Cuban trade agreement of December 18, 1939, 54 Stat. 1997.

Supplementary Cuban trade agreement of December 23, 1941, 55 Stat. 1449.

Relevant portions of said acts and agreements are set forth in the appendix, infra, pp. i-ix.

STATEMENT

The following is presented as a pertinent statement of facts and law:

1) The trade agreement in question, while not technically a treaty, has the effect of one. *Altman v. US*, 224 US 583.

2) Article VIII, of the trade agreement of 1934, which is quoted below, had as its purpose and effect the "freezing" of the rate of internal-revenue tax chargeable upon importation of articles enumerated in Schedule II, which included "rum, in bottles containing each one gallon or less."

> Article VIII . . . and all articles enumerated and described in Schedule II annexed to this Agreement, with respect to which a rate of duty is specified in Column 2 of the said Schedule, shall be exempt from all taxes, fees, charges, or exactions, in excess of those imposed or required to be imposed by laws of the United States of America in effect on the day on which this Agreement comes into force.

3) At the time of the agreement one of the import taxes applicable to such rum was at the rate of $2 per proof gallon, imposed by the Revenue Act of 1918, as amended, upon "all distilled spirits . . . produced in or imported into the United States"; also, by virtue of the Revenue Act of 1938, effective July 1, 1938, the rate of tax thus referred to was changed to $2.25 per proof gallon.

Upon consideration of these facts, and with recognition by the parties that the rule of law in respect to conflicts between treaties and subsequent acts of Congress is applicable here, the Court of Customs and Patent Appeals found that the trade agreement of 1934 and the statute of 1938 are "absolutely irreconcilable and that therefore the subsequent legislation supersedes by clear implication the quoted portion of that agreement."

This reversed the decision by the Customs Court, which unanimously had held that the tax was illegally imposed. In reaching this conclusion the latter court recognized

that a conflict existed between the agreement and the statute, but found that supplemental trade agreements with Cuba, dated December 18, 1939, 54 Stat. 1997, TD 50050, and December 23, 1941, 55 Stat. 1449, TD 50541 (appendix, pp. v-ix), by virtue of which the restriction contained in the agreement of 1934 was modified, were "indicative of the intention of the parties to the trade agreement and also of their understanding of the terms of such agreement." The court then said (R 11):

> . . . Apparently both parties recognized that under the terms of article VIII of the original trade agreement with Cuba the exclusive rates therein provided would not be subject to laws which might subsequently be enacted, which later laws might be in conflict with the terms of the agreement. Apparently, also, in these later agreements it was considered wise by both parties to provide for the imposition of a rate or change which would be compensatory for increased internal taxes imposed on like domestic goods.

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1) In holding that the statute of 1938 and the agreement of 1934 are absolutely irreconcilable.

2) In failing to harmonize or reconcile the statute and the trade agreement by holding that the statute applied to all distilled spirits produced in the United States and to all distilled spirits imported into the United States, except rum imported from Cuba in bottles containing each one gallon or less.

3) In reversing the judgment of the Customs Court.

REASONS FOR GRANTING THE WRIT

1) Importance of decision below:

The principle involved, i.e., whether an act of Congress should, in the absence of clear and manifest legislative intent, be construed to modify a prior trade agreement, is one of broad application.

From 1934 to date, the President, acting under authority of power granted to him by Congress (sec. 350 (a), Tariff Act of 1930 as amended, infra, pp. ii-iii), has entered into trade agreements with twenty-five foreign nations, each of which contains pledges that rates of duty or other import restrictions specified therein will not be altered to the prejudice of the foreign country during the life of the agreement. Therefore the decision below, holding as it does that a subsequent law acts to repeal a trade agreement, despite an absence of clear legislative intent to effect repeal, is a decision of general importance to the continued administration of tariff laws and to negotiations under the trade-agreement act.

2) Conflicts between treaties and statutes:

The following decisions, pertaining to abrogation or modification of treaties by subsequent statutes, express the rule relied upon. Therefore, as a clear legislative intent to effect repeal is not evident here, the decision below does not accord with a principle of statutory construction followed by this court for many years.

a) *Chew Heong v. US,* 112 US 536, 540, 550:

> (540:) Aside from the duty imposed by the constitution to respect treaty stipulations when they become the subject of judicial proceedings, the court cannot be unmindful of the fact, that the honor of the govern-

ment and people of the United States is involved in every inquiry whether rights secured by such stipulations shall be recognized and protected. And it would be wanting in proper respect for the intelligence and patriotism of a co-ordinate department of the Government were it to doubt, for a moment, that these considerations were present in the minds of its members when the legislation in question was enacted.

(550:) In *State v. Stoll*, 17 Wall. 430, the language of the court was that "It must appear that the later provision is certainly and clearly in hostility to the former. *If, by any reasonable construction, the two statutes can stand together, they must so stand.* If harmony is impossible, and only in that event, the former law is repealed in part, or wholly, as the case may be." See also *Ex parte Crow Dog*, 109 U. S. 570; *Arthur v. Homer*, 96 U. S. 140; *Harford v. U. S.*, 8 Cranch, 109.

When the act of 1882 was passed, Congress was aware of the obligation this government had recently assumed, by solemn Treaty, to accord to a certain class of Chinese laborers the privilege of going from and coming to this country at their pleasure. Did it intend, within less than a year after the ratification of the Treaty and without so declaring in unmistakable terms, to withdraw that privilege by the general words of the 1st and 2d sections of that Act? Did it intend to do what would be inconsistent with the inviolable fidelity with which, according to the established rules of international law, the stipulations of treaties should be observed? These questions must receive a negative answer. *The presumption must be indulged* that the broad language of these sections was intended to apply to those Chinese laborers whose coming to this country might, consistently with the

Treaty, be reasonably regulated, limited or suspended, and not to those who, by the express words of the same Treaty, were entitled to go and come of their own free will, and enjoy such privileges and immunities as were accorded to the citizens and subjects of the most favored Nation.

b) *Whitney v. Robertson,* 124 US 190, 194:

When the two (a treaty and statute) relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; . . .

c) *US v. Gue Lim,* 176 US 459, 465:

We ought, therefore, to so consider the act, if it can reasonably be done, as to further the execution, and not to violate the provisions of the treaty.

d) *US v. Lee Yen Tai,* 185 US 213, 221, 222:

Nevertheless, the purpose by statute to abrogate a treaty, or the purpose by treaty to supersede the whole or a part of an act of Congress, must not be lightly assumed, *but must appear clearly and distinctly from the words used in the statute or in the treaty.* . . .

A statute . . . should never be held to be displaced by a treaty, subsequently concluded, unless it is impossible for both to stand together and be enforced.

e) *Cook v. US,* 288 US 102, 119, 120:

The Treaty (of 1924)) was not abrogated by reenacting section 581 in the Tariff Act of 1930 in the identical terms of the Act of 1922. *A treaty will not be deemed to have been abrogated or modified by a*

> *later statute unless such purpose on the part of Congress has been clearly expressed.* Chew Heong v. United States, 112 US 536; United States v. Payne, 264 US 446, 448. Here, the contrary appears. The committee reports and the debates upon the act of 1930, like the reenacted section itself, make no reference to the treaty of 1924.

From the foregoing it is clearly the duty of courts not to adjudge that a treaty has been repealed by a subsequent statute unless the intention of Congress to effect such repeal appears clearly and distinctly.

Here, the court below, upon observing (R 22) that the statute related to "*all* distilled spirits imported into the United States," concluded therefrom that Congress "certainly must have intended to include imported rum regardless of the size of the containers and regardless of the country from which exported." In other words, the court concluded that Congress intended to modify the trade agreement because, when taken literally, the statute was in conflict. That such a conclusion is not warranted appears from *Washington v. Miller,* infra, wherein it was found that a statute which, when "taken literally," would "by reason of the generality of its terms," have effected repeal of a prior statute, did not have such effect.

It should also be noted that here the appellate court said (R 23):

> *We are fortified in our conclusion that the Congress intended by the provisions of the said revenue act to include the involved merchandise as taxable for internal revenue purposes* as hereinbefore set out by the manner in which it worded section 704 of the same act in providing for a tax on lumber, as follows:

> (b) Each sentence of the amendment by subsection (a) shall become effective (1) on the sixtieth day after the date of the enactment of this Act *unless in conflict with any international obligation of the United States* or (2) if so in conflict, then on the termination of such obligation otherwise than in connection with the undertaking by the United States of a new obligation which continues such conflict. (Italics ours.)

From the above-quoted language it is plain to us that the Congress in enacting the said revenue act had clearly in mind the international obligations of the United States such as the one here involved, and *if it had intended that merchandise from Cuba such as in the instant case was to be excepted from the scope of that act it would have so stated* as it did with respect to the tax on lumber.

Again it may be said that the opinion as thus expressed does not accord with the cited decisions, because the court proceeded under the theory that *absence* of an expression by Congress not to modify indicates intention to modify.

Also, Congressional intention as evidenced by one portion of the Revenue Act of 1938 amending the Revenue Act of 1932 is not indicative of Congressional intention in respect to a different portion of the Revenue Act of 1938 amending the Revenue Act of 1918.

3) Inconsistent statutes of different dates:

In addition to being in conflict with the foregoing decisions relating to treaties and statutes, the decision conflicts with the following cases pertaining to repeal of statutes by subsequent statutes, the principles of which are applicable:

a) *Beals v. Hale,* 4 How. 37 (syllabus, 11 L.ed. 865):

> Statutes which apparently conflict with each other *are to be reconciled, as far as may be, on any fair hypothesis,* and validity given to each if it can be and is necessary to conform to usages under them, or to preserve the titles to property undisturbed.

b) *Wood v. US,* 16 Pet. 342 (syllabus, 10 L.ed. 987):

> There must be a positive repugnancy between the new and old laws for the collection of the revenue before the old law can be considered as repealed; . . . There ought to be a manifest and total repugnancy in the provisions of the later laws, to lead to the conclusion that they abrogated, and were designed to abrogate the former laws.

c) *Washington v. Miller,* 235 US 422, 427-8:

> It next is insisted that the two provisos were repealed by a provision in the act of April 28, 1904 (33 Stat. at L. 573, chap. 1824) reading as follows:
>
> > "All the laws of Arkansas heretofore put in force in the Indian Territory are hereby continued and extended in their operation so as to embrace all persons and estates in said Territory, whether Indian, freedmen, or otherwise, . . ."
>
> No repealing clause accompanied this provision, so the question is, did it repeal the provisos by implication? *There is no doubt that, if taken literally,* it would subject the Creek lands to the Arkansas law of descent and distribution without any qualification or restriction. *But this would be only by reason of the generality of its terms,* for it made no mention of that law or of those lands. In short, it was plainly a general statute, and did not show that the attention

of Congress was then particularly directed to the descent of the lands of the Creeks. On the other hand, section 6 of the supplemental agreement and its two provisos dealt with that subject in specific and positive terms which made it certain that the Creeks and their lands were particularly in mind at the time. *In these circumstances we think there was no implied repeal,* and for these reasons: First, such repeals are not favored, and usually occur only where there is such an irreconcilable conflict between an earlier statute that effect reasonably cannot be given to both. (United States v. Healey, 160 US 136, 146; United States v. Greathouse, 166 US 601, 605; *second, where there are two statutes upon the same subject, the earlier being special and the later general, the presumption is, in the absence of an express repeal, or an absolute incompatibility, that the special is intended to remain in force as an exception to the general* (Townsend v. Little, 109 US 504, 512; Ex part Crow Dog, 109 US 556, 570; Rodgers v. United States, 185 US 83, 87-89); and, third, there was in this instance no irreconcilable conflict or absolute incompatibility, for both statutes could be given reasonable operation if the presumption just named were recognized.

d) *West India Oil Co. v. Domenech,* 311 US 20 (syllabi 3 and 4, 85 L.ed. 16):

3. Subsequent enactment by Congress of general legislation extending to fuel oil the benefits of the customs laws and regulations affecting merchandise imported in bond did not impliedly repeal, as regards fuel oil, the consent given by an earlier act to taxation by Puerto Rico of goods as soon as brought into the island.

4. Repeals by implication are not favored, and will not be adjudged unless the legislative intention to repeal is clear.

e) *Rodgers v. US,* 185 US 83, 87:

It is a canon of statutory construction that a later statute, general in its terms and not expressly repealing a prior special statute, will ordinarily not affect the special provisions of such earlier statute. In other words, where there are two statutes, the earlier special and the later general,—the terms of the general broad enough to include the matter provided for in the special,—*the fact that one is special and the other is general creates a presumption that the special is to be considered as remaining an exception to the general,* and the general will not be understood as repealing the special, unless a repeal is expressly named, or unless the provisions of the general are manifestly inconsistent with those of the special.

f) *Rosecrans v. US,* 165 US 257, 262:

In other words, where Congress has expressly legislated in respect to a given matter that express legislation must control *in the absence of subsequent legislation equally express,* and is not overthrown by any mere inferences or implications to be found in subsequent legislation.

As taken from the above, the following composite statement of the rule of statutory construction applies here:

They should be reconciled "on any fair hypothesis" *(Beals v. Hale);* a "positive repugnancy" is required to effect repeal *(Wood v. US);* it is to be presumed that a special statute remains "an exception to the general"

statute *(Rodgers v. US)*, and "express legislation must control, in the absence of subsequent legislation equally express" *(Rosecrans v. US)*. Also, even though the subsequent statute "if taken literally" would "by reason of the generality of its terms" conflict with the former, it is not to be so construed, because (1) such repeals are not favored, (2) the earlier special statute is presumed to remain in force, and (3) it does remain in force unless irreconcilably in conflict or absolutely incompatible *(Washington v. Miller)*.

The decision in *Washington v. Miller*, supra, is particularly appropriate in the present case, for the revenue act in question "if taken literally" (as it was taken by the court below), does "by reason of the generality of its terms" conflict with the trade agreement. However, the analogy ends there, and the court below did not apply the stated principles.

Also, because of the analogy of facts shown by the quoted portion of *Cook v. US*, supra, that decision is pertinent. It was there said (p. 120):

> A treaty will not be deemed to be abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed . . . *Here, the contrary appears. The committee reports and the debates upon the act of 1930, like the reenacted section itself, make no reference to the treaty of 1924.*

Exactly the same condition exists here. Yet the court below, after finding that Congress was presumed to have knowledge of the Cuban trade agreement, concluded that the statute related to "all" spirits and that therefore Con-

gress "intended to include imported rum regardless of the size of the containers and regardless of the country from which exported" (R 22).

Further reference to *Chew Heong v. US,* supra, discloses that an opinion was there expressed in regard to facts closely resembling those in the present case. Here the court below has held that a statute general in terms nullified in part an international agreement of special scope. Similarly, in the *Chew Heong* case this court considered whether a statute (secs. 1, 2, act of 1882) excluding from the United States "*any* Chinese laborer . . . from *any* foreign port or place" applied to a Chinese laborer whose right of return to this country was guaranteed by a prior treaty, and in that respect it was observed (112 US 547-8):

> If these sections constituted the entire legislation in reference to the coming to this country of Chinese laborers, the court, under the established rules for the interpretation of statutes, would hold that they did not apply to Chinese laborers who, by their residence in the United States at the date of the last Treaty, had acquired the right to go and come of their own free will. . . .

So in the instant case, even had Congress, as held by the court below (R 22), in 1938 "enacted the statute providing that *all distilled spirits imported into the United States* should be subject to an internal revenue tax of $2.25 per proof gallon" such enactment would not have impaired the favorable status guaranteed to some Cuban rum by a prior trade agreement.

4) Certiorari granted in similar cases:

Further, by the decision below a question of general importance and of substance involving the construction of a statute of the United States and the construction of an international obligation, which has the effect of a treaty, was determined for the first time, and in a manner, as is shown above, in conflict with applicable decisions of this court.

The question thus determined resembles that involved in *Lau Ow Ben v. US*, 141 US 583, wherein the subject of review by certiorari is discussed. See also *Re Woods*, 143 US 202, wherein it was said in regard to the granting of certiorari in the *Lau Ow Ben* matter (p. 206):

> In the matter of Lau Ow Ben, the construction of Acts of Congress in the light of treaties with a foreign government, and status of domicile in respect of natives of one country domiciled in another, a matter of international concern, were brought under consideration upon the record, and we were of the opinion that the grounds of the application were sufficient to call for our interposition.

Here, it also appears that construction of an act of Congress in the light of trade agreements with a foreign government is required. Also, the faith to be accorded such agreements, in the absence of a clear intent by Congress to modify them, is a matter of international concern.

In addition, the granting of this writ is appropriate for reasons referred to in *West India Oil Co. v. Domenech*, 311 US 20, supra, wherein it was said (p. 24):

> We granted certiorari in 309 US 652, because the question presented is of importance in the adminis-

> tration of the customs laws of the United States and of the revenue laws of Puerto Rico and because of an asserted conflict with our decision in McGoldrick v. Gulf Oil Corp., 309 US 414.

5) Statute and trade agreement here reconcilable:

That the statute in question and the trade agreement can be interpreted in harmony was held by the trial court. Such interpretation accords with the well-known plan of tariff legislation whereby Cuba, since 1902, has been accorded a preferential status in regard to payment of customs duties.

Also, the supplementary trade agreements between the United States and Cuba, dated December 18, 1939 and December 23, 1941, manifestly had as their purpose the nullification of the 1934 agreement so far as it "froze" either the rate of internal tax upon Cuban products specified in the agreement or the rate of internal tax which Cuba might impose upon products of the United States. Therefore it clearly appears, as held by the trial court, that in *1939* neither party to the agreement was of opinion that the revenue act of 1938 had modified the 1934 pact or was intended by Congress to modify it.

Evidence of Congressional intent in regard to termination of these agreements is found in section 350 (a), infra, p. iii, wherein it is said:

> The President may at any time terminate any such proclamation in whole or in part.

When it is considered that under this provision the President, by virtue of the supplementary agreement of 1939, did terminate article VIII of the 1934 agreement

insofar as it restricted assessment of internal taxes, should it be found that Congress, by its enactment of the Revenue Act of 1938, intended to modify the same provision?

Reconciliation of the trade agreement and the statute by the court below would merely have required a holding that the statute applies to all imported distilled spirits *except* rum imported from Cuba in bottles containing each one gallon or less. In this regard the question closely resembles that involved in *Movius v. Arthur,* 95 US 144, and *Arthur v. Lahey,* 96 US 112, wherein it was held that specific provisions in a tariff act were not affected by general words of a subsequent tariff.

6) No conflict created by statute of 1938:

The foregoing has been presented upon the same principles of law as were argued by petitioner in both courts below, and as were considered by said courts. There is, however, an additional reason for granting this writ, and though it was not presented by petitioner to the court below or considered by said court, it is of such fundamental character and so vital to the foundation of this action as to permit its consideration now. *Old Jordan M. & M. Co. v. Societe Anonyme Des Moines,* 164 US 260, 265; *Gila Valley G. & N. R. Co. v. Hall,* 232 US 94, 98; *Grant Bros. Constr. Co. v. US,* 232 US 647, 660; *Magruder v. Drury,* 235 US 106, 113-4; *Duignan v. US,* 274 US 195, 200. The point referred to arises from the following circumstances:

By section 710, Revenue Act of 1938, Congress enacted the following provision:

SEC. 710. Tax on Distilled Spirits.

(a) Section 600 (a) (4) of the Revenue Act of 1918, as amended, is amended to read as follows:

"(4) on and after January 12, 1934, and until July 1, 1938, $2.00, and on or after July 1, 1938, $2.25, on each proof or wine gallon when below proof and a proportionate tax at the like rate or all fractional parts of such proof or wine gallon."

This legislation was amendatory of the Revenue Act of 1918 as amended, to the extent (1) of changing the rate of tax therein provided, and (2) of specifying periods of time during which the new rate applied. Therefore it is here claimed to be an act of Congress not in conflict with the trade agreement of 1934, because by this amendment Congress did not *in 1938*, as held by the court below (R 22), enact a "statute providing that *all distilled spirits imported into the United States* should be subject to an internal revenue tax of $2.25 per proof gallon" (italics quoted).

By section 600 (a), Revenue Act of 1918, Congress had provided that "all distilled spirits . . . that may be . . . hereafter imported into the United States" should be taxed at $2.20 per gallon. By the Revenue Act of 1926 (sec. 900) this language was reenacted in the form of an amendment, but with different rates specified. On January 11, 1934, (Liquor Taxing Act of 1934) section 600 of the Revenue Act of 1918 as amended was again amended, but only to the extent of changing the rate of tax. Then by article VIII of the Cuban trade agreement, the rate in effect *at that time* was "frozen."

Therefore, section 710 of the Revenue Act of 1938, by which Congress merely changed the *rate* of tax, should not be construed as being an enactment *in 1938* of the provision found in section 600, Revenue Act of 1918, namely, that *all* imported distilled spirits were taxable at the new rate of $2.25 per gallon.

On the contrary, the act of 1938 should be construed to accord with the terms of the prior agreement, with the result that after the effective date of said act all imported distilled spirits, *except* those covered by the Cuban agreement, were subject to the new rate. This accords with the principle of statutory construction referred to in the following:

a) *Commonwealth v. Howes,* 270 Mass. 69, considered an amendment granting to municipal authorities the power to prohibit the taking of fish. The original statute authorized these authorities to "control and regulate" such taking, and the amended statute added to this phrase the words "or prohibit." As to the amendment it was said (p. 72):

> . . . When adopted, the legislative amendment became a part of the original statute to the same extent as to everyone as if always contained therein unless the amendment involves the abrogation of contractual relations between the State and others. *Fitzgerald v. Lewis,* 164 Mass. 495, 499; *Wheelwright v. Tax Commissioner,* 235 Mass. 584, 585.

b) *Allison v. Hatton,* 46 Or. 370, relates to the tax status of certain land in Oregon which by an act of 1885 had been incorporated within the boundaries of Columbia

county. In 1898 an act amending an independent act of 1895 established boundaries for Washington county, including therein a strip of land which was then a part of Columbia county. In 1901 an act amending the original act of 1885 changed the boundaries of Columbia county so as to include land not theretofore in any county. In addition, this act of 1901 reenacted the act of 1885 (as it then appeared in section 2251, Hill's Ann. Laws of 1887) by stating that section 2251 "is hereby amended to read as follows," and then setting forth the section in full as originally enacted, without reference to the act of 1898 which had given to Washington county a portion of the land originally included in Columbia county. As to these facts the court said (p. 372):

> . . . The act of 1901, amending section 2251, so far as the question here involved is concerned, is not a new legislative declaration on the subject of boundaries of the county, but merely a restatement or republication of the law as it existed prior to the act of 1898, *and therefore not in conflict with the latter act, and does not repeal by implication.* The rule is that where a section of the statute is amended so as to read "as follows," and the section is then set forth with the changes intended to be made, those portions of the old section that are merely copied into the amendment without change are not to be considered as reenacted or as a new statement of the law, but are to be read as a part of the earlier statute, if in conflict with another law passed after the section amended and before the amendatory act, unless there is a clear manifestation of legislative intention to the contrary. In the absence of such intention, it is the change or additions incorporated in the section

amended only that are to be considered enacted. This doctrine has been several times applied by this court, and is supported by authorities. *Endlich, Interp. Stat.* sec. 194; *Stingle v. Nevel,* 9 Or. 62; *Eddy v. Kincaid,* 28 Or. 537 (41 Pac. 156, 159); *Small v. Lutz,* 41 Or. 570 (67 Pac. 421, 69 Pac. 825).

c) *Endlich on Interpretation of Statutes,* thus referred to by the Oregon Court, states (sec. 194):

> It has been held that where a statute merely re-enacts the provision of an earlier one, it is to be read as part of the original statute, and not of the reenacting one, if in conflict with another passed after the first, but before the last act; and therefore does not repeal by implication the intermediate one.

d) *Stingle v. Nevel,* 9 Or. 62: Here, upon somewhat the same subject, it was said with respect to a reenacted statute which appeared to conflict with an intermediate one (p. 64):

> In *Ely v. Horton,* 15 N.Y. 597, it was held that where a section of a statute "is amended to read as follows," and the section is then set forth with the changes to be made, those portions of the old section that are merely copied without change, are not to be considered as repealed and re-enacted, but such portions remain in force from the first enactment. It is the changes, or additions, incorporated into the section amended that are enacted. *S. P. Moore v. Mansert,* 49 N.Y. 332; *People v. Supervisors,* 67 N.Y. 109; *Burwell v. Tullis,* 12 Minn. 486; *Alexander v. State,* 9 Ind. 339.

The court then held that the republication of the Oregon statute was "not a re-enactment"

e) *City of St. Louis v. Alexander,* 23 Mo. 483: And here it was held (p. 509):

> . . . Now the effect of the revision of the charter, on the 3d of March, 1851, was, not to make former provisions, which had previously existed, and were continued, to begin from that date, but for convenience sake to embody all the acts in relation to the charter into one law, leaving the acts in force at the time of the revision to take date from the period when they were first passed. It would be of the most mischievous consequence to hold that the revision of a law had the effect of making the revised law entirely original, to be construed as though none of its provisions had effect but from the date of the revised law. When a former provision is included in a revised law, it is only thereby intended to continue its existence, not to make it operate as an original act to take effect from the date of the revised law. The revision has not the effect of breaking the continuity of those provisions which were in force before it was made.

f) See also *City of Cape Girardeau v. Riley,* 52 Mo. 424, stating (p. 429):

> . . . The revision of a law does not have the effect of making the revised law entirely original, so as to be construed as though none of its provisions had effect but from the date of the revised law.
>
> When a former provision is continued in a revised law, it operates only as a continuance of its existence, and not as an original act. (*St. Louis v. Alexander,* 23 Mo. 509.)

g) Upon this subject it is said in *Sutherland's Statutory Construction,* 3d ed., sec. 1933:

> Provisions of the original act or section which are repeated in the body of the amendment, either in the same or equivalent words, are considered a continuation of the original law. . . . The provisions of the original act or section reenacted by the amendment are held to have been the law since they were first enacted, and the provisions introduced by the amendment are considered to have been enacted at the time the amendment took effect. Thus, rights and liabilities accrued under provisions of the original act which are reenacted are not affected by the amendment.

h) *US v. La Franca,* 282 US 568: Here the court had before it the direct question of whether section 701, Revenue Act of 1924, reenacting certain provisions of the Revenue Act of 1918, should be considered to be a statute "in force when the National Prohibition Act (of 1919) was enacted." As to this it was said (pp. 571-2):

> This section was passed in lieu of a similar provision in the Revenue Act of 1918, repeated by the Revenue Act of 1921. The government, accordingly, treats the item sought to be recovered under section 701 as having been imposed by an act in force prior to the National Prohibition Act. With that view we agree.

i) *People v. New York C. & St. L. R. Co.,* 316 Ill. 452: The legislature by an act of 1917 had modified an act of 1901 by excluding the taxes of certain districts from the provisions of said act of 1901. In 1919, 1921, and 1923 the original act of 1901 was reenacted in connection with the adoption of certain amendments thereto, but no reference was made to the act of 1917. Upon these facts the court said in respect to the question of whether the

laws of 1919, 1921, and 1923 were in conflict with and operated as a repeal of the 1917 statutes (pp. 457-8):

> . . . Moreover, when the General Assembly amends a statute and no change is made in parts of it, the repeated portions, either literally or substantially, are regarded as a continuation of the existing law and not as the enactment of a new law upon the subject. *People v. Lloyd,* 307 Ill. 23; *Svenson v. Hanson,* 289 Ill. 242. The amendments to section 2 of the act approved May 9, 1901, made in 1919, 1921 and 1923, were not enactments of new laws upon the subject of the levy and extension of taxes, but constituted merely the continuation of the existing law with the respective amendments added, modified by section 17 of the act approved May 17, 1917, as amended. **There is no repugnancy between the two.**

In most of the cited cases the legislative bodies, when amending the prior statutes, repeated their provisions and added the desired changes. Yet the courts held that such repetition was not a reenactment of the original statutes *as of the date of amendment,* but, as so appropriately stated in *People v. New York,* supra, "merely the continuation of the existing law with the respective amendments added, *modified* by section 17 of the act approved May 17, 1917, as amended."

In the present case Congress in 1938 did not restate the terms of the Revenue Act of 1918 as amended, but merely (1) amended that portion which had specified the rate of tax, and (2) specified the effective date of the new tax. Therefore, the Revenue Act of 1938 was not an enactment *in 1938* that "*all* distilled spirits . . . that may be hereafter . . . imported into the United States" should

be taxed at $2.25 per gallon. Hence the questions passed upon by the court below were actually not involved.

In presenting this last point due regard has been given to the fact that when laws are amended the amended act is usually construed, as to subsequent occurrences, as if it had been originally enacted in the amended form. *US v. La Franca,* 282 US 568, 571-2; *Blair v. Chicago,* 201 US 400, 475; *Pennsylvania Co. v. US,* 236 US 351, 362. But as is shown by the above authorities this rule does not apply in cases such as the present, particularly when by an intervening act or event rights have been created which would be violated if the amendment were considered as an enactment of the original statute upon the date of amendment.

In the event this writ is granted and later it is concluded that the point referred to above should have been presented by counsel to the lower court, it would be appropriate to remand the case to that court for determination of the question. Such action was taken in *US v. La Franca,* 282 US 568, under very similar circumstances.

CONCLUSION

It is respectfully submitted that this petition for writ of certiorari should be granted.

San Francisco, November 1, 1943.

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(APPENDIX FOLLOWS)

Appendix

Revenue act of 1918, c. 18, 40 Stat. 1057, 1105:

SEC. 600(a) That there shall be levied and collected on all distilled spirits now in bond or that have been or that may be hereafter produced in or imported into the United States, . . . a tax of $2.20 . . . on each proof gallon . . . to be paid by the distiller or importer when withdrawn, and collected under the provisions of existing law.

Revenue act of 1926, c. 27, 44 Stat. 104:

SEC. 900. Subdivision (a) of section 600 of the revenue act of 1918, as amended, is amended to read as follows:

(Thereafter the terms of section 600, supra, were repeated, with the exception of the rate of tax. As to the rate it was said:)

(3) On and after January 1, 1928, $1.10 on each proof gallon . . .

Liquor taxing act of 1934, c. 1, 48 Stat. 313, effective January 12, 1934:

SEC. 2. Paragraphs (3) and (4) of subdivision (a) of section 600 of the revenue act of 1918, as amended (relating to the tax on distilled spirits generally and the tax on distilled spirits diverted for beverage purposes (U.S.C., Sup. VI, title 26, sec. 1150 (a) (1) and (2)) are amended to read as follows:

(3) . . .

(4) On and after the effective date of Title I of the liquor taxing act of 1934, $2 on each proof gallon. . . .

Revenue act of 1938, c. 289, 52 Stat. 447, 572, effective July 1, 1938:

SEC. 710. Tax on Distilled Spirits.

(a) Section 600 (a) (4) of the Revenue Act of 1918, as amended, is amended to read as follows:

> "(4) On and after January 12, 1934, and until July 1, 1938, $2.00, and on and after July 1, 1938, $2.25, on each proof gallon or wine gallon when below proof and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon."

(b) Section 600 (c) of such Act, as amended, is amended by striking out "$2.00 per wine gallon" and inserting in lieu thereof "$2.25 per wine gallon."

(c) Section 4 of the Liquor Taxing Act of 1934 is amended by striking out "$2.00" and inserting in lieu thereof "$2.25."

(d) The amendment made by this section shall not apply to brandy and the rates of tax applicable to such brandy shall be the rates applicable without regard to such amendments.

Act of June 12, 1934, c. 474, 48 Stat. 943, amending the tariff act of 1930 by adding the following provision:

PART III. Promotion of Foreign Trade

SEC. 350(a) For the purpose of expanding foreign markets for the products of the United States . . . the President, whenever he finds as a fact that any existing duties or other import restrictions of the United States or any foreign country are unduly burdening and restricting the foreign trade of the United States and that the purpose

above declared will be promoted by the means hereinafter specified, is authorized from time to time—

(1) To enter into foreign trade agreements with foreign governments or instrumentalities thereof; and

(2) To proclaim such modifications of existing duties and other import restrictions, or such additional import restrictions, or such continuance, and for such minimum periods, of existing customs or excise treatment of any article covered by foreign trade agreements, as are required or appropriate to carry out any foreign trade agreement that the President has entered into hereunder. . . . The proclaimed duties and other import restrictions shall apply to articles the growth, produce, or manufacture of all foreign countries, whether imported directly, or indirectly: . . . The President may at any time terminate any such proclamation in whole or in part.

(b) Nothing in this section shall be construed to prevent the application, with respect to rates of duty established under this section pursuant to agreements with countries other than Cuba, of the provisions of the treaty of commercial reciprocity concluded between the United States and the Republic of Cuba on December 11, 1902, or to preclude giving effect to an exclusive agreement with Cuba concluded under this section, modifying the existing preferential customs treatment of any article the growth, produce, or manufacture of Cuba: Provided, That the duties payable on such an article shall in no case be increased or decreased by more than 50 percentum of the duties now payable thereon.

(c) As used in this section, the term "duties and other import restrictions" includes (1) rate and form of import

duties and classification of articles, and (2) limitations, prohibitions, charges, and exactions other than duties, imposed on importation or imposed for the regulation of imports.

Cuban trade agreement of 1934, effective September 3, 1934, 49 Stat. 3559, 3564, 3644, T.D. 47232:

A PROCLAMATION

WHEREAS, I, Franklin D. Roosevelt, President of the United States of America, have, on August 24, 1934, pursuant to and in accordance with the provisions of the Act of Congress, approved June 12, 1934, entitled "An Act to Amend the Tariff Act of 1930," entered into a trade agreement, with two attached Schedules, with the President of the Republic of Cuba, which Agreement and Schedules in the English and Spanish languages are in words and figures as follows:

The President of the United States of America and the President of the Republic of Cuba, desirous of strengthening the traditional bonds of friendship and commerce between their respective countries by maintaining as the basis for their commercial relations the granting of reciprocal *preferential* treatment, in continuation of the policy adopted in the Convention of Commercial Reciprocity of 1902 between the two countries, and taking into consideration that changed conditions have rendered it necessary to modify the provisions of that Convention, have arrived at the following Agreement:

* * * * * * *

Article VIII

All articles the growth, produce, or manufacture of the United States of America or the Republic of Cuba, shall, after importation into the territory of the other country, be exempt from national or federal internal taxes, fees, charges, or exactions, other or higher than those payable on like articles of national or any other foreign origin.

All articles enumerated and described in Schedule I annexed to this Agreement, with respect to which a rate of duty is specified in Column 2 of the said Schedule, shall be exempt from all taxes, fees, charges, or exactions, in excess of those imposed or required to be imposed by laws of the Republic of Cuba in effect on the day on which this Agreement comes into force; *and all articles enumerated and described in Schedule II annexed to this Agreement, with respect to which a rate of duty is specified in Column 2 of the said Schedule, shall be exempt from all taxes, fees, charges, or exactions, in excess of those imposed or required to be imposed by laws of the United States of America in effect on the day on which this Agreement comes into force.*

The provisions of this Article insofar as they apply to taxes, fees, charges, or exactions imposed within the United States of America, shall apply only to such taxes, fees, charges, or exactions as are subject to statutory control by the Federal Government of the United States of America.

* * * * * * *

SCHEDULE II

Tariff act of 1930 paragraph	Description of articles	Column 1 Minimum preferential reduction to Cuba	Column 2 Maximum rates of duty. Specific rates in United States dollars
802	Rum, in bottles containing each one gallon or less	20%	2.50 per proof gallon

Supplementary Cuban trade agreement of December 18, 1939, 54 Stat. 1997, 2006-2008, T.D. 50050:

A PROCLAMATION

WHEREAS it is provided in the Tariff Act of 1930 of the Congress of the United States of America, as amended by the Act of June 12, 1934, entitled "An Act To Amend the Tariff Act of 1930" (48 Stat. 943), which amending Act was extended by Joint Resolution of Congress, approved March 1, 1937 (50 Stat. 24), as follows:

* * * * * * *

WHEREAS, pursuant to the said Tariff Act of 1930, as amended, an exclusive and preferential Trade Agreement was entered into between the United States of America and the Republic of Cuba on August 24, 1934, which Agreement I did make public by my proclamation of August 24, 1934, and which Agreement is now in force between the two countries;

WHEREAS I, Franklin D. Roosevelt, President of the United States of America, *have found as a fact that certain existing duties and other import restrictions of the United States of America and the Republic of Cuba are*

unduly burdening and restricting the foreign trade of the United States of America and that the purpose declared in the said Tariff Act of 1930, as amended by the said Act of June 12, 1934, as extended by the said Joint Resolution of Congress, approved March 1, 1937, will be promoted by a trade agreement to supplement and amend the exclusive and preferential Trade Agreement entered into between the United States of America and the Republic of Cuba on August 24, 1934;

* * * * * * *

The President of the United States of America and the President of the Republic of Cuba, being desirous of strengthening still further the traditional bonds of friendship and commerce between their respective countries by maintaining the basis of reciprocal preferential treatment in their commercial relations, *and of making certain changes* in the provisions of the trade agreement between the United States of America and the Republic of Cuba signed at Washington on August 24, 1934, have resolved to conclude a supplementary agreement for that purpose and have, through their respective Plenipotentiaries, agreed on the following Articles:

* * * * * * *

ARTICLE III

Article VIII of the Agreement of August 24, 1934, is amended to read as follows:

Articles the growth, produce or manufacture of the United States of America or the Republic of Cuba shall, after importation into the other country, be exempt from all internal taxes, fees, charges or exactions other or higher than those payable on like articles of national or

any other foreign origin, subject, in the case of the United States of America, to the constitutional limitations on the authority of the Federal Government.

* * * * * * *

Articles the growth, produce or manufacture of the Republic of Cuba enumerated and described in Schedule II annexed to this Agreement shall, on their importation into the United States of America, be exempt from all duties other than ordinary customs duties and all taxes, fees, charges or exactions, imposed on or in connection with importation, in excess of those imposed on September 3, 1934, or required to be imposed thereafter by laws of the United States of America in force on September 3, 1934.

* * * * * * *

The provisions of Article I and Article III of this Agreement and of the third paragraph of this Article *shall not prevent the Government of the United States of America from imposing at any time on the importation of any article a charge equivalent to an internal tax imposed in respect of a like domestic article or* in respect of a commodity from which the imported article has been manufactured or produced in whole or in part.

Supplementary Cuban trade agreement of December 23, 1941, 55 Stat. 1449, 1468, T.D. 50541:

ARTICLE IV

1. The second paragraph of Article VIII of the Agreement of August 24, 1934, as amended, is amended to read as follows:

Articles the growth, produce or manufacture *of the United States* of America enumerated and described in Schedule I annexed to this Agreement, with respect to which a rate of duty is specified in the said Schedule, shall, *on their importation into the Republic of Cuba,* be exempt from all other duties, taxes, fees, charges or exactions, imposed on or in connection with importation, in excess of those imposed on September 3, 1934, or required to be imposed thereafter by laws of the Republic of Cuba in force on September 3, 1934.

2. The fourth paragraph of Article VIII of the Agreement of August 24, 1934, as amended, is hereby deleted.

3. The last paragraph of Article VIII of the Agreement of August 24, 1934, as amended, is amended to read as follows:

The provisions of this Agreement shall not prevent the Government of *either country* from imposing at any time on the importation of any article a charge equivalent to an internal tax imposed in respect of a like domestic article or in respect of a commodity from which the imported article has been manufactured or produced in whole or in part.

In the Supreme Court of the United States

OCTOBER TERM, 1943

RATHJEN BROTHERS, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

This case presents the same question as that in *Schenley Import Corporation* v. *United States*, No. 405, Present Term, in which certiorari was denied on November 8, 1943. The two cases were decided on the same day by the Court of Customs and Patent Appeals, and the decision in the instant case was made the basis for the decision in the *Schenley* case (Schenley, 79 Treas. Dec. Advance Sheets, August 19, 1943, p. 39; present case, *ibid.*, p. 35 (9 U. S. Cust. Ct. 50)). No additional reasons of substance have been advanced in the petition in this case for review.[1]

[1] In reliance upon the rule of construction that an amendatory act which merely repeats the provisions of an earlier statute is not to be construed as repealing by implication an

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For the reasons stated in the Government's brief in opposition in the *Schenley* case, it is respectfully submitted that the petition for a writ of certiorari in the instant case should be denied.

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Solicitor General.

PAUL P. RAO,
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JOHN R. BENNEY,
Attorney.

CHARLES J. MIVILLE,
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NOVEMBER 1943.

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intermediate one which deals with some specific phase of the subject matter, particularly where such a construction would disturb vested rights, petitioner contends here, for the first time in this case, that there is no real conflict between Section 710 of the Revenue Act of 1938 and Article VIII of the Cuban Trade Agreement of 1934; that the 1938 Act should be interpreted as increasing the tax as to all imported distilled spirits except those covered by the Cuban agreement (Pet. 3–4, 19–27). This contention is without merit since, as is pointed out in the Government's brief in opposition in the *Schenley* case (pp. 6–7), the intention of Congress by the 1938 Act to increase the tax on distilled spirits despite conflicting provisions in international obligations is reflected from the fact that in the same Act it expressly saved international obligations when it desired to do so in connection with internal revenue taxes on imported lumber. And, of course, petitioner had no vested right to the maintenance of an existing rate of tax. *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 318; *United States* v. *Bush*, 310 U. S. 371, 379.

U. S. GOVERNMENT PRINTING OFFICE: 1943

End